80-1870

No.

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IN THE

Supreme Court of the United States

TERM, 1981

NEW YORK TYPOGRAPHICAL UNION No. 6,
Petitioner,

against

TRIANGLE PUBLICATIONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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III

Questions Presented

1. Whether it was error to terminate the pension rights and payments to retirees after the unilateral termination of the collective bargaining agreement by the defendant employer in the course of its term?

2. Whether it was error for the District Court to deny recovery on a claim set forth in the written agreement sued upon on the ground that the claim was not pleaded in the complaint, after the Court had made successive and unmodified posttrial findings that the plaintiff had established its right to this claim by a fair preponderance of the evidence, and after the Court had made an unmodified conclusion of law that the substance of the claim was one of the plaintiff's principal contentions upon the trial?

TABLE OF CONTENTS

	PAGE
Opinions in the Courts Below	1
Jurisdiction	3
Questions Presented	3
Statute Involved	4
Statement	4
Reasons For Granting the Writ	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:	PAGE
Allied Chemical and Alkali Workers, Local No. 1 v. *Pittsburgh Plate Glass Co.*, (1971) 404 U.S. 157, 181, n. 20	8
Craig v. *Bemis Co., Inc.* 517 F. 2d 677; (CA 5)	9
Farmer v. *Arabian Oil Co.* (CA 2, 1960) 285 F.2d 720, 722	13
First Nat. Bank of Hollywood v. *A. M. Foam Rubber Corp.* (CA 2, 1976), 530 F.2d 450, 453, T. n. 3	15
Francois v. *Francois* (CA 3, 1979) 599 F.2d 1286	15
Gearns v. *Commercial Cable Co.*, 293 N.Y. 105	9
Gins v. *Mauser Plumbing Supply Comp.* (CA 2, 1945) 148 F.2d 974	13
Hurd v. *Hutnik* 419 F. Supp. 630	9
Joint Council Dining Car Employees Local 370 v. *Delaware, L&WRC* (CA 2, 1946), 157 F.2d 417	13
Matarese v. *Moore McCormack Line, Inc.* (CA 2, 1946), 158 F.2d 631	13
Morton Bld. of Nebraska, Inc. v. *Morton Bldrs, Inc.* (CA 8, 1976), 531 F.2d 910, 919	14
O'Brien v. *Moriarity* (CA 1, 1971), 489 F.2d 941	13
Pete v. *UMW Welfare & Retirement Fund*, 517 F.2d 1275 (D.C. Circ.)	9
Prudential Oil Corp. v. *Phillips Petroleum Co.* (CA 2, 1976), 418 F. Supp. 258, rev'd on other grounds, 546 F.2d 469	13
Publishers Assn. of New York City v. *New York Printing Pressman's Union No. 2*, DCNY 246 F. Supp. 293	14
Roddy v. *Valentine* 268 N.Y. 228	9
Sias v. *City Demonstration Agency*, (CA 9, 1978) 588 F.2d 692	15
United States v. *Bess* 357 U.S. 54, 55	15

Rules:	
FRCP 15(b)	14
FRCP 16(6)	14
FRCP 36	12
FRCP 54(c)	13

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NEW YORK TYPOGRAPHICAL UNION NO. 6,
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against

TRIANGLE PUBLICATIONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

New York Typographical Union No. 6, hereby petitions that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals entered on February 10, 1981.

Opinions in the Courts Below

Opinions of the Courts below, none of which is as yet officially reported, are as follows:

(i) Opinion of Hon. Lawrence W. Pierce, in the United States District Court for the Southern District of New York, filed on September 14, 1978 in which the defendant was found to have "suspended" the operation of the Morning Telegraph within the meaning of the collective bargaining agreement, and that by virtue thereof, the defendant

was obligated to make suspension payments to those employees covered by the agreement. The District Court also denied therein, plaintiffs claims for sick pay, vacation pay and pension pay.

(ii) Order of Judge Pierce in the United States District Court for the Southern District of New York, filed December, 29, 1978, in which the Court modified and amended its opinion of September 14, 1978, by granting the plaintiff sick pay and vacation pay, but which again denied pension pay.

This order also determined that the amount of suspension pay should be as fixed in the Basic Agreement, rather than by the formula set forth in the Supplemental Agreement.

(iii) Opinion and order of Judge Pierce in the United States District Court for the Southern District of New York, filed April 24, 1979, in which the Court modified and amended its order of December 29, 1978, by holding that the rate and amount of suspension pay was to be based upon the terms set forth in the Relocation Severance Pay section of the Supplemental Agreement, rather than Section 27 of the Basic Agreement.

(iv) Opinion and Order of Judge Pierce in the United States District Court for the Southern District of New York, filed December 20, 1979, in which the Court modified and amended the opinion dated September 14, 1978, by denying plaintiff's claim for suspension payments.

(v) Order of Judge Pierce in the United States District Court for the Southern District of New York, filed March 10, 1980, which denied plaintiff's application to reargue the opinion and order of the Court dated December 20, 1979.

(vi) Order of the United States Court of Appeals for the Second Circuit, filed December 10, 1980, which affirmed

the judgment of the District Court upon the opinions of the Judge Pierce dated September 14, 1978; September 21, 1978; December 19, 1978; April 24, 1979; December 20, 1979; March 10, 1980; and April 25, 1980. (Document dated April 25, 1980 was not an Opinion, but the Judgment A 35).

(viii) Order of the United States Court of Appeals for the Second Circuit, dated February 10, 1981, denying a petition for a rehearing.

II

Jurisdiction

The Order of the United States Court of Appeals for the Second Circuit was entered on December 18, 1980 (A 32). A petition for a rehearing was denied on February 10, 1981 (p. A 34). The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254 (1).

III

Questions Presented

1. Whether it was error to terminate the pension rights and payments to retirees after the unilateral termination of the collective bargaining agreement by the defendant employer in the course of its term?
2. Whether it was error for the District Court to deny recovery on a claim set forth in the written agreement sued upon on the ground that the claim was not pleaded in the complaint, after the Court had made successive and unmodified posttrial findings that the plaintiff had established its right to this claim by a fair preponderance of the evidence, and after the Court had made an unmodified conclusion of law that the substance of the claim was one of the plaintiff's principal contentions upon the trial?

IV

Statute Involved

The statutory provision involved is 29 U.S.C. Sec. 185 (a), (Section 301 of the Labor Management Relations Act) which reads:

> "Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

V

Statement

This is an action for breach of a collective bargaining agreement between the petitioner and respondent.

Petitioner's several claims arose on April 7, 1972, when respondent permanently suspended the publication of its daily horse racing paper, called the Morning Telegraph, (MT), in New York City, during the term of the collective bargaining agreement subsisting between the parties. At the time of the suspension, the respondent had commenced publication of a second daily horse racing paper called the Daily Racing Form, (DRF), in Hightstown, New Jersey, and was circulating the same in New York City. The composing room operation of both papers produced the same or similar material, i.e. lists of horse races, betting odds and past track performances.

The petitioner sued for relocation severance pay as provided in the collective bargaining agreement, on the theory that the respondent had, in fact, removed the operation of

the composing room from MT to DRF, and as a necessary allegation in that claim, alleged in its complaint that the respondent had completely shut down the MT's composing room operation. The petitioner also made claim for accrued vacation and sick pay benefits, and for the pensions which the retirees had been receiving at the time of the suspension.

The collective bargaining agreement between the parties consisted of two documents, 1) the Basic Agreement, which applied generally to all daily newspapers in New York City with which petitioner had contracts; and 2) the Supplemental Agreement, whose terms applied solely to the Respondent herein. The Basic Agreement contained a provision requiring the employer to pay a certain sum of money in the event that publication was permanently suspended in the course of the agreement. The Supplemental Agreement contained two provisions: the Relocation Severance clause, which required the employer to pay an amount certain to the employees, in the event that it relocated the operation of its composing room to another locality, as severance pay; and also a Suspension and Merger Clause, which required the employer to pay suspension pay to the employees in the event that there was a suspension of publication during the term of the agreement. However, the formula for the payment of relocation severance pay and for suspension pay, in the latter agreement, was the same, and the Court so found. (A 21)

A trial to the Court ultimately resulted in a judgment for the petitioner on its claim for vacation and sick pay, but denied its claim for severance or suspension pay, and also denied its claim for pension payments to the retirees.

In its first opinion rendered after trial, September 14, 1978, the District Court set forth its basic findings and conclusions. Insofar as material hereto, the Court found therein that the claim for "suspension" pay, as distinct from "relocation severance" pay was one of the petitioner's

principal contentions upon the trial. (A 9). The Court also found therein that: "The evidence establishes that (the respondent) did suspend the operation of the MT within the meaning of the collective bargaining agreement. . . . Therefore, (the respondent) was obligated under the agreement to make suspension payments to the union members." (A 11, par. 4).

From that, the Court concluded that the petitioner had "established by a fair preponderance of the credible evidence" that the respondent had "suspended" the operation of the MT within the meaning of the collective bargaining agreement, and that "by virtue of this agreement," the respondent was obligated to make suspension payments. (A 12). These findings have never been reversed or modified by the District Court or the Court of Appeals. In the same opinion, however, the Court denied petitioner's claims for vacation and sick pay, and also its claim for pensions for the retirees.

The petitioner timely moved for reconsideration by the District Court of its denial of the vacation and sick pay, and also the denial of the pensions to the retirees. At the same time, and at its direction, the Court also agreed to resolve the dispute that had arisen between the parties as to the amount of the suspension pay which respondent was obligated to pay, pursuant to the Court's previous opinion: the respondent contending that it should be as fixed in the Basic Agreement, and the petitioner contending that it should be as fixed in the Supplemental Agreement. (A 13)

The Court, by its decision dated December 12, 1978, found that the amount of the suspension pay should be as fixed by the formula contained in the Basic Agreement, as contended by the respondent. At the same time, it modified its prior opinion by granting petitioner's claims for vacation and sick pay, but adhered to its prior determination in denying the claim for pension pay. In respect to the claim for retirement pay, the Court stated:

> "The Plaintiff contends that the rights of union members to receive income under the provisions for a Pension Plan, as described in the Supplemental Agreement, were vested upon their becoming eligible to receive such payments. However, the provision of this plan states that 'the Pension Plan will not be terminated or modified during the life of the collective bargaining agreement without mutual consent.' (Supplemental Agreement at p. 10) The language of this provision implicitly suggests that the plan may be terminated upon the expiration of the supplemental agreement. As determined in the earlier opinion of this Court, the agreement terminated when the defendant suspended the operations of the Morning Telegraph. Moreover, the agreement provides that the Pension Plan would not be funded. Payments of benefits were to be made from the general funds of the Morning Telegraph. When the Morning Telegraph ceased to exist, no further payments could be made from its general funds. The Plan must, therefore, have been intended to terminate when the Morning Telegraph ceased its operations. Consequently, the defendant is not liable for pension payments which plaintiff claims to have accrued after the date of suspension of operations." (A 16-A 17)

It is to be noted therein that the Court reiterated therein its previous finding and conclusion that the "defendant (respondent) suspended the operations of the Morning Telegraph." Ibid.

Thereafter, the petitioner moved for reconsideration of the Court's determination that the amount of the suspension pay should be as fixed by the formula contained in the Basic Agreement. In its opinion and order, dated April 24, 1979, the Court modified its prior opinion dated December 29, 1978, by holding that the amount of the suspension pay should be as fixed by the formula contained in the Supplemental Agreement, as contended by petitioner. Significant thereto is the fact that neither party challenged the Court's

basic findings in respect to the issue, i.e. petitioner's right to suspension pay, as contained in its opinion dated September 14, 1978, but rather, both parties based its contentions as to the proper amount thereof solely on the terms and provisions of the agreement that had been marked into evidence at the time of trial, and the Court so noted. (A 20, f.n.2; A 22, f.n.3).

However, almost two years after trial, (the trial having concluded in February, 1978), and more than fifteen months after it had first set forth its basic findings and conclusions, the same District Court wholly denied petitioner's claim for suspension pay on the wholly new ground that this claim was ". . . not actually litigated . . .". (A 29). In that opinion, dated December 20, 1979, the Court did not even attempt to nullify its previous findings and conclusions that petitioner's principal contention upon the trial was its right to suspension pay, and that it had established the same by a fair amount of the credible evidence. Rather, inexplicably, it expressly reaffirmed, by implication, the findings and conclusions contained in its opinion of September 14, 1978. (A 25, f.n.1).

The Court of Appeals affirmed the judgment on all the opinions of the Court below, with the caveat that its order of affirmance was not to be reported, cited or otherwise used in unrelated cases in any court. (A 32).

Reasons for Granting the Writ

I

The decisions below are in clear violation of federal labor policy with respect to pension rights of retirees, as enunciated by this Court.

In *Allied Chemical and Alkali Workers, Local No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181, N. 20; (1971), this court stated:

> "Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer.
>
> This does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916-920 (1970). Retirees, moreover, would have a federal remedy under Sec. 301 of the Labor Relations Act for breach of contract if their benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201. . ."

The trial Court, in denying the claim for pension payments did so upon two grounds. The first was that, the pension plan could be terminated upon the expiration of the Supplemental Agreement and that such agreement was terminated when defendant suspended the operations of the Morning Telegraph. The second ground was that the pension plan was not funded. Neither of those grounds is valid.

In *Hurd* v. *Hutnik*, 419 F. Supp. 630, it was held that although negotiated pension plans in collective bargaining agreements must conform to certain federal requirements, the interpretation of their language must be made in accordance with state law. See also, *Craig* v. *Bemis Co., Inc.*, 517 F. 2d 677; (C.A.—5); *Pete* v. *UMW Welfare and Retirement Fund*, 517 F. 2d 1275 (D.C. Cir.).

In New York, the Courts have stated that there can be no interference with a retiree's pension benefits, once they have vested.

> *Roddy* v. *Valentine*, 268 N.Y. 228; *Gearns* v. *Commercial Cable Co.*, 293 N.Y. 105.

Here, the retirees were receiving pensions at the time the Court below held that the contract was terminated. Once

the pensions were received, they became vested. Once vested, those pensions could not be terminated without the consent of the retirees, *Allied Chemical and Alkali Workers, Local 1* v. *Pittsburgh Plate Glass Co., supra.* No such consent was given in this case and none can be implied.

The suggestion by the trial Court, adopted by the Court of Appeals, that the contract contains language which, by implication, permitted the termination of the pension plan upon the expiration of the Supplemental Agreement is totally immaterial, if, indeed, it is correct. It is immaterial because the pension plan was in effect when the retirees retired, and the plan provided that pensions would be paid for the life of the retirees. Even if the defendant terminated the pension plan at the time the contract terminated, that would not terminate the rights of the retirees to receive pensions, absent their consent.

Also, immaterial is the fact that the pension plan was not funded. At the time it was negotiated, there was no legal requirement that it must be funded. Furthermore, there was no assertion by the defendant that it did not have the funds to pay the retirees.

In denying payments to retirees, neither the trial court nor the Court of Appeals, relied upon any authority in support of their findings.

In denying payments to retirees, neither the trial Court nor the Court of Appeals, made any mention of the vested rights of retirees or of the necessity of having their consent to the termination of their pension payments, as expressly directed by this Court.

The decision below contains novel and far reaching implications on the rights of retirees to pension payments when collective bargaining agreements expire. If an employer may legally terminate payments to retirees when the collective bargaining agreement is terminated by its unilateral action, as the decision below holds, there will be introduced into the field of labor relations an unsettling

and revolutionary precedent that is contrary to express law and should not be permitted to stand.

To find, as the Court below has found, that a valid contract existed between the parties and that recovery could be had for a breach of that contract for some benefits therein provided, but denied as to other benefits incorporated therein, is inconsistent and illogical.

II

With respect to the denial of either suspension pay or severance pay, the Court below made inconsistent and contradictory findings, and in so doing, ignored the governing provisions of the Federal Rules of Civil Procedure, and made a major departure from the settled law in its own, and other federal circuits.

In its opinion and order dated September 14, 1978, the trial court found that the defendant suspended the publication of the Morning Telegraph on April 7, 1972. From such finding of fact, the trial court made the following conclusion of law:

> "The evidence establishes that Triangle did suspend the operation of the MT within the meaning of the collective bargaining agreements." (A 11)

and further held:

> "Accordingly, for the reasons stated, the court finds that plaintiff has established by a fair preponderance of the credible evidence that the defendant 'suspended' the operation of the Morning Telegraph within the meaning of the collective bargaining agreement and that by virtue of this agreement, Triangle is obligated to make suspension payments to those employees so covered." (A 12)

The trial court reaffirmed those findings and conclusions, both expressly and impliedly, in several post-trial orders

and opinions, all addressed to the issue of the correct formula to be used in determining the amount of suspension payments.

However, in its opinion and order dated December 20, 1979, made more than 15 months later, the trial Court completely reversed itself to the extent of totally denying recovery of any suspension payments.

In the Joint Pretrial Order, pursuant to *FRCP 16*, the respondent formally admitted, after having denied it in its answer, (A 37-38, par. Sixth; A 42, First Defense) that:

> "On April 7, 1973, (sic) Triangle suspended publication of the MT." (A 54).
>
> (It is undisputed that the misspelled year was a typographical error, and that it should read "1972". It was further undisputed, and understood by both parties and the Court, that the term "Triangle", as last used in paragraph Sixth of the complaint, was a typographical error, and should have read "Telegraph".)

Despite that unqualified admission, the trial Court, in its opinion and order dated December 20, 1979, stated that this admission was offered by the defendant "apparently" to support its contention that it was not liable for relocation pay. (A 26).

That ruling by the court below is diametrically opposed to the plain meaning and clear intendment of *FRCP 36*, which expressly provides, in part, that:

> "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission . . .", and that the truth thereof may be used for any purpose in the pending litigation.

No motion was ever made by the defendant to amend or qualify the admission and, accordingly, it was improper for the court below to so restrict its application.

It is significant that the defendant, despite several interim post-trial applications to the Court, never raised an issue as to its non-liability for suspension payments until

after it had unsuccessfully argued that it was liable for a lesser amount than the trial Court ultimately found. See Court Opinion 4/24/79. (Appendix C)

The issue of suspension pay was actually tried both by express or implied consent of the parties, as is abundantly evident in the Joint-Pre-Trial order and several opinions and orders of the court. Therefore, that issue must be treated in all respects as if it was raised in the pleadings.

> *O'Brien* v. *Moriarity* (CA-1) (1971), 489 F.2d 941;
>
> *Prudential Oil Corp.* v. *Phillips Petroleum Co.* D.C.N.Y. (1976), 418 F. Supp. 258, rev'd no other grounds (CA-2) (1976), 546 F.2d 469.

Here, the defendant contested the *amount* of suspension pay only, and since the issue was based solely on documentary evidence i.e. the collective bargaining agreement which was before the Court at the time of trial, it was *litigated* in a series of post-trial motions also; all of which occurred prior to entry of judgment.

The mandate in *FRCP 54(c)* that a trial court must grant the relief to which a party is entitled, regardless of whether it was prayed for in the pleadings, supports the plaintiff's position.

In part, *FRCP 54(c)* directs that:

> ". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."
>
> *Gins* v. *Mauser Plumbing Supply Comp.* (CA-2, 1945), 148 F.2d 974;
>
> *Joint Council Dining Car Employees Local 370* v. *Delaware, L&WRC* (CA-2, 1946), 157 F.2d 417;
>
> *Matarese* v. *Moore-McCormack Line Inc.* (CA-2, 1946), 158 F.2d 631;
>
> *Farmer* v. *Arabian Oil Co.* (CA-2, 1960), 285 F.2d 720, 722;
>
> *Riggs, Ferris & Greer* v. *Lillybridge* (CA-2, 1963), 316 F.2d 60.

Publishers' Assn. of New York City v. *New York Newspaper Printing Pressman's Union No. 2* (DCNY 1965), 246 F. Supp. 293.

The District Court's resort to the provisions of *FRCP 15 (b)* as the basis for denying recovery of the claim for suspension pay is also wholly immaterial and without legal merit. In its extensive treatment of the requirements of that rule, it not only did not mention that it had cancelled the hearings scheduled for the last day of trial, when the *pro forma* oral motion is made under that rule, but it totally ignored the governing provisions of *FRCP16*, which rendered such a motion unnecessary. Since the parties had entered into a formal joint pretrial order, wherein the respondent had categorically admitted the suspension of publication of the MT, that order ". . . controls the subsequent course of the action. . ." *FRCP 16 (6)*. This is particularly true where, as here, both the parties and the Court had, in hand, at the time of trial, the entire agreement between the parties, which set forth the exclusive remedy in the event that a suspension of publication was found.

FRCP 54(c) has been held as authority for the grant of money damages to a plaintiff even though it had made no claim for the same in its complaint, and had first made claim therefor *after* judgment. The Court of Appeals held that it was reversible error not to have granted the same, since the defendant had admitted liability therefor in its answer.

Morton Bld. of Nebraska, Inc. v. *Morton Bldrs., Inc.* (CA 8, 1976) 531 F.2'd. 910, 919.

In a contract action, the Second Circuit affirmed the grant of relief upon a theory that was not only not asserted below, but was not even included in the stipulation of grounds upon which the parties agreed that the District Court could grant or deny relief.

First Nat. Bank of Hollywood v. *A.M. Foam Rubber Corp.* (CA 2, 1976) 530 F.2d 450, 453, f.n.3.

The Third and Ninth Circuits are similarly in accord.

Francois v. *Francois* (CA 3, 1979) 599 F.2d 1286
Sias v. *City Demonstration Agency* (CA 9, 1978) 588 F.2'd. 692.

In a case analagous to the instant case, this Court, also, affirmed the grant of relief upon a theory not expressed in the complaint, since the essential facts pertinent to a decision on the merits had been stipulated to, in the District Court.

United States v. *Bess* 357 U.S. 54, 55.

Here, the parties had unqualifiedly stipulated, in advance of trial, that the respondent had suspended the publication of the MT before the expiration of the collective bargaining agreement, and the contract, which was in evidence, expressly provided for the grant of money damages in such event.

CONCLUSION

For the reasons stated, it is respectfully submitted that this court should grant the petition for a writ of certiorari to review the judgment of the court of appeals for the Second Circuit.

Respectfully submitted,

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APPENDICES TO THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TABLE OF CONTENTS

PAGE

APPENDICES

Appendix A—Opinion of the Honorable Lawrence W. Pierce ..... A 1

Appendix B—Order of the Honorable Lawrence W. Pierce ..... A 13

Appendix C—Opinion and Order of the Honorable Lawrence W. Pierce ..... A 18

Appendix D—Opinion and Order of the Honorable Lawrence W. Pierce ..... A 23

Appendix E—Order of the Honorable Lawrence W. Pierce ..... A 31

Appendix F—Order of United States Court of Appeals for the Second Circuit, affirming the judgment of the District Court ..... A 32

Appendix G—Order of the United States Court of Appeals for the Second Circuit, denying Appellant Motion for a Rehearing ..... A 34

Appendix H—Judgment ..... A 35

Appendix I—Amended Complaint ..... A 36

Appendix J—Answer and Counterclaim ..... A 42

Appendix K—Reply ..... A 52

Appendix L—Joint Pretrial Order (Excerpt) ..... A 54

APPENDIX A
OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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LAWRENCE W. PIERCE, D.J.

OPINION

Plaintiff, Bertram A. Powers, brings this action for damages on behalf of the New York Typographical Union No. 6, against the defendant, Triangle Publications, pursuant to 29 U.S.C. §185 (§301 of the Labor Management Relations Act) for alleged breach of a collective bargaining agreement said to have existed between the parties. This action was tried to the Court and, in accordance with Rule 52(a) Fed.R.Civ.P., the following shall constitute the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff, Bertram A. Powers ("Powers") is and for all times relevant herein was the president of New York

Typographical Union No. 6 ("the Union"), an affiliated member of the International Typographical Union. As president, Powers was authorized to negotiate and enter into collective bargaining agreements with the defendant on behalf of the union. He brings this action on behalf of the union and its members who were employed by the now defunct racing newspaper, the Morning Telegraph ("the MT"). The defendant, Triangle Publications ("Triangle") is and, for all times relevant herein, was the owner and publisher of the MT, as well as the Daily Racing Form ("the DRF"), also a newspaper serving the horse racing community.

For many years prior to 1952, both the MT and the DRF were published and circulated by the defendant in the New York metropolitan area, the publication of the MT having begun as early as 1833. However, on January 7, 1952, the defendant, while continuing its publication of the DRF in other parts of the United States, discontinued its circulation in New York; thereby leaving only the MT to service the communications-information needs of the horse-racing public in the area.

The MT's format was similar to that of a standard size newspaper, as compared to the DRF which was published in a tabloid format. The MT provided its readers with such information as past performances of race horses (characterized by witnesses for both parties as the "bread and butter" of racing papers) as well as information regarding the various race tracts, including the Waterford Tract. During the years of the publication of the MT, the prevalent means of type-setting—the composing of material to be printed—was through the use of "hot metal" presses. However, during the laters years of MT's publication, the hot metal press method was being replaced by the new computerized method of photocomposition. The union members involved herein were for many

years prior to 1970 the employees who were responsible for setting the type of the MT. They operated out of its composing room, and were covered by various collective bargaining agreements executed on their behalf by Powers with Triangle, including the agreement at issue in the instant action.

In August of 1969, a meeting was held in Colorado between Triangle and the Executive Council of the International Typographical Union ("ITU"). At this meeting, Triangle through its president Stewart Hooker announced plans to reestablish publication and circulation of the DRF in the New York area; its operating facilities to be located in Hightstown, New Jersey.[1] Hooker announced that Triangle's plans were to inaugurate the use of the photocomposition method of typesetting, and accordingly inquired as to which local union of the ITU had geographical jurisdiction in Hightstown. Although the ITC informed Triangle that Trenton Typographical Union, No. 71 ("No. 71") had jurisdiction, in 1971, the ITU, presumably in accordance with its bylaws, granted plaintiff Union jurisdiction over the MT "when the plant is moved from its present location in New York City, . . . or when and if the MT is eventually produced in the aforementioned plant."[2]

In the fall of 1969, Triangle began what it terms a "research and development facility" in Hightstown, and in November, 1969, over the protestations of plaintiff Union, Triangle recognized Local No. 71 as the duly

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[1] The plaintiff alleges that the move to Hightstown was an attempt by Triangle to "get from under the New York locals." Triangle contends that the move was prompted by its desire to have a facility equally accessible from New York and New Jersey.

[2] The ITU has certain powers to grant jurisdiction or to extend the jurisdiction of the local unions.

authorized collective bargaining representative of the Hightstown employees.[3] Also, during this period, certain executives of the MT (publisher, director of labor relations, and trade division editor) opened offices at Hightstown.

Triangle entered into a collective bargaining agreement with Local No. 71 which covered all composing room work to be performed at Hightstown, from the period commencing November 1, 1969 up to October 31, 1972, but with provision for an earlier termination date:

> "in the event the work performed by Employees covered by [the] agreement is to be used for the production of the [MT] or a localized parallel edition thereof. . . ."

In addition, a letter concerning the collective bargaining agreement was written by Steward Hooker to the president of the ITU to the effect that "[the contract with No. 71] was fully understood by both parties to be a full and complete Production Contract unless the [MT] was subsequently to be relocated in Hightstown, in which case the contract with the Trenton Typographical Union would be reopened for discussion." In November, of 1971, the collective bargaining agreement was reopened and a new one executed on July 21, 1972.

In February or March of 1970, Triangle and the plaintiff Union commenced negotiations for a new collective bargaining agreement to cover the composing room employees at the MT in New York. Prior to that time, the Union had submitted copies of its contract proposals to its parent organization, the ITU. By July, 1970, an agreement had been reached between the parties. It consisted of the incorporation of the terms of an underlying con-

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[3] The union did not attempt to follow any of the procedures established by the NLRB with respect to certification or challenging jurisdiction of locals.

tract which had been agreed upon by the Union and other New York City newspapers and a "Supplemental Agreement."[4] The agreement contained terms covering the following relevant subjects

1. Plant relocation clause—required the publisher to recognize the union as the bargaining representative for the composing room employees should the MT composing room or a "local parallel edition" of the MT be published in another location.

2. Relocation Severance Pay—required the publisher to pay a certain amount to each employee should the MT composing room operation be moved.

3. Pension Plan—established a pension plan to become active upon the ratification of the agreement and called for the termination of pension payments upon the death of the retired employee; that the duration of the plan would be for the life of the collective bargaining agreement and that disputes arising under the plan were to be settled in accordance with the rules of the American Arbitration Association.

The agreement further called for the payment of suspension pay in the event the MT was merged or publication thereof was permanently suspended. And the agreement contained the following provision;

> It is the intention and the desire of the parties hereto that no strike or other interruption of normal employment or production shall occur during the life of this agreement. To this end the Union and the Publishers commit themselves to the orderly settlement of disputes as provided herein . . . However, [the union] reserves to itself the right to direct its

[4] The provision in the collective bargaining agreement pertaining to relocation and suspension, etc. is embodied in the "Supplemental Agreement."

> members to support a strike of this Union or . . . against any publisher signatory hereto which strike has been authorized under the laws of the [ITU]. Should such support or should unauthorized work stoppages by members of Typographical Union No. 6 result in substantial curtailment of composing room operations, the Publisher thereby affected reserves the right to be relieved of the prohibition against use of substitute processes or operations as provided in the jurisdictional section hereof during the period in which such support is granted . . . Upon resumption of normal operations, use of substitute processes or operations shall be discontinued. The Union agrees that it will not support a strike or work stoppage under any other circumstances.

On July 14, 1970, the plaintiff Union submitted a copy of the proposed agreement to the ITU for approval. By letter dated July 17, 1970, the ITU indicated that it would approve signed copies of the agreement. On July 31, 1970, the agreement was executed by Willima H. Williams on behalf of MT. The Union, however, refused to execute the agreement. Rather, Powers returned the unsigned agreement, which had been ratified by the Union membership, to the publisher with the words "*The Morning Telegraph*" crossed out and replaced by "Triangle Publications, Inc." Powers refused to execute the Supplemental Agreement on behalf of the Union unless Triangle was the signatory instead of the *Telegraph*.

Thereafter, the Union brought a unfair labor practice charge against Triangle before the National Labor Relations Board because of Triangle's refusal to execute the Supplemental Agreement. The Acting Regional Director of the Board refused to issue a complaint, stating that,

> "Your [the Union's] insistence that Triangle Publications, Inc. execute the new agreement rather

> than its subsidiary division, the Morning Telegraph, is without foundation since the evidence clearly establishes that the latter is and has been the employer of the employees involved herein, has bargained for them as their employer, and Triangle Publications, Inc., the parent corporation, has no obligation to execute an agreement with you on behalf of these employees."

That decision was upheld by the NLRB General Counsel.

It is uncontested that following the NLRB proceedings, the Union never executed the Supplemental Agreement and was never requested to do so by Triangle. Triangle did, however, implement the economic benefits called for by the Agreement and did, later bring an action purportedly based on the Supplemental Agreement seeking to enjoin the Union from engaging in a work slowdown at the *Telegraph*. See *Morning Telegraph* v. *Powers*, 450 F.2d 97 (2d Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

Thereafter, two meetings were held between the publisher of the MT and the union. At the first meeting, held on September 16, 1970, Triangle announced that the MT would continue to publish indefinitely. And at the second meeting, held on October 24, 1970, Powers again demanded that the plaintiff Union be given jurisdiction over employees at the Triangle Publications Research and Development Center at Hightstown. Upon the denial of this request by Triangle, Powers walked out of the meeting.

On October 25, 1971, the first edition of the eastern edition of the DRF was published from Hightstown. The format of the paper, in contradistinction to the tabloid format published in Chicago, Seattle and Toronto, was

similar to that of a standard sized newspaper and the MT. Contained therein, in addition to past performances and other racing accounts, was information concerning the Waterford Park track, previously published in the MT when such information was available.

During December, 1971 and January, 1972, Triangle made seasonal layoffs of approximately eighteen composing room employees. Although winter lay-offs were traditional in the composing room, and although no more employees were laid off in 1972 than had been in previous years during the same period, the plaintiff Union demanded that Triangle recall all the laid-off employees and that the Waterford Park information be published in the MT.[5] The publisher refused to accede to the latter demand, as well as to the demands that it extend the collective bargaining agreement for another two years and that the plaintiff union be given jurisdiction over Hightstown.

On or about the first week in April of 1972, the composing room employees, led by Powers, commenced a strike against the MT and set up pickets around the building in New York. On April 7, Triangle suspended the publication of the MT. There was no attempt made by either Triangle or the plaintiff Union to grieve the issues allegedly giving rise to the strike, nor, contrary to past actions, did Triangle seek to enjoin the strike by court action or otherwise. On July 3, 1972, the day before July 4th, a big day in racing, the union picketed Triangle's plant in Hightstown and continued such picketing sporadically until October 2, 1973. The pickets read, "Triangle doing struck work", and the picket lines were honored by all but one member of Local 71, including the

[5] All of the employees who had been laid off were eventually recalled.

New York guild members, and the mail deliverers unions, and riggers of the machinists' union.[4]

CONTENTIONS

The plaintiff Union contends that the evidence establishes that the defendant engaged in a deliberate effort to move the composing room of the MT to Hightstown and that this move constituted a "relocation" (or at least, "suspension") of the MT within the meaning of the collective bargaining agreement requiring payment of certain monies to the named employees.

The defendant first contends that the union's failure to execute the collective bargaining agreement renders its obligations, if any, to perform thereunder void. In addition, Triangle contends that the union's petition to the ITU for permission to strike constituted a material breach of the collective bargaining agreement, thereby releasing defendant from any performance thereunder. And finally, the defendant contends that the composing room of the DRF is not that of the MT; that the suspension of the operations at the MT were caused by an illegal strike called by plaintiff; and that the picketing by the union and the "violent" acts of its members caused Triangle damages for which it may obtain relief.

CONCLUSIONS OF LAW

1. Jurisdiction over this action is exercised pursuant to § 301 of the Labor Relations Management Act, 29 U.S.C. § 185 (1976).

2. Where the parties to a collective bargaining agreement act in reliance on the agreement as if a valid

[4] Thereafter, the union appealed the issues of the employees at Hightstown doing allegedly "struck work" and the question of jurisdiction of Local 71. Both appeals were denied by the convention delegates.

agreement existed, it is immaterial that one party did not sign it. See *National Labor Relations Board* v. *Local 825*, 315 F.2d 695, 699 (3d Cir. 1963). Here, while it may appear that Power's refusal to sign the agreement indicates an intention to reject the offer on the terms extended, and indeed, his crossing out of the words "Morning Telegraph" and his insertion of the word "Triangle" would appear to be a counter-offer, the Court must look to the parties' behavior thereafter to determine the question of the existence of a valid agreement. In so doing, this Court finds that the parties acted as if a valid agreement existed. Until the instant dispute, the parties operated according to the terms of the agreement. The union worked according to the hours, terms and conditions set forth therein; and Triangle implemented certain of the terms of the agreement such as the pension plan, etc. Moreover, Triangle, the party now contesting the existence of a valid agreement, sought relief against the plaintiff Union in another action before the circuit court for this district based on this very same collective bargaining agreement. See *Morning Telegraph* v. *Powers*, 450 F.2d 97 (2d Cir. 1971), *cert. denied*, 405 U.S. 954 (1972). To allow a party to assert the existence of a contract on the 17th floor in this courthouse, but to assert the nonexistence of the same contract on the 3rd floor, would be a self-serving act, *par excellence*, which should not be countenanced by the Court. Accordingly, this Court finds that the actions of the parties herein evidence the existence of a valid, existing collective bargaining agreement, and that Triangle, because of its prior reliance on the existence of such a valid agreement is estopped from now asserting a position to the contrary.

3. Triangle did not "relocate" the composing room of the MT to Highstown. Nor does the DRF constitute a "local parallel" edition of the MT. The evidence establishes that the composing room of the DRF was to be entirely

different than that of the MT. Triangle sought through the reestablishment of the publication of the DRF in this area to take advantage of the advances in technology—the photocomposition process, as well as to consolidate its publications servicing the racing community under one masthead—the Daily Racing Form. This is substantiated by the evidence which establishes that the masthead of the MT was old and revered. Therefore, Triangle's discontinuance thereof indicates its desire to discontinue the MT entirely.

4. The evidence establishes that Triangle did suspend the operation of the MT within the meaning of the collective bargaining agreement. Although the strike was a factor considered by Triangle in its decision to suspend the publication of the MT, for the reasons stated in paragraph 3, *supra*, the decision to suspend had been made previous to the strike. Therefore, Triangle was obligated under the agreement to make suspension payments to the union members.

5. The union's acts of requesting permission of the ITU to strike and that of striking did not constitute material breaches of the collective bargaining agreement. The collective bargaining agreement itself set forth the procedure to be followed by the union in the event a strike is contemplated. The union, having followed that procedure herein, and having received permission of the ITU, acted in accordance with the terms of the contract agreed to by the defendant and, thus, cannot be considered to have breached the agreement as alleged. Triangle, therefore, was not relieved of its obligation to make suspension payments by virtue of the strike.

6. Upon Triangle's suspension of operation of the MT, the parties rights and obligations set forth in the collective bargaining agreement terminated. Therefore,

Triangle was no longer obligated to make pension payments, vacation payments or sick payments.

7. Triangle has failed to prove that it suffered damage because of the strike by the union. The evidence of the amount a prospective, "hypothetical" purchaser would have paid for the MT is speculative and cannot be considered sufficiently probative on the question of damages allegedly suffered. Further, the union herein cannot be held responsible for the actions of other unions in honoring a duly authorized picket line, even though such acts may have prevented Triangle from salvaging some of its equipment and machinery left at the MT offices.

Accordingly, for the reasons stated, the Court finds that plaintiff has established by a fair preponderance of the credible evidence that the defendant "suspended" the operation of the Morning Telegraph within the meaning of the collective bargaining agreement and that by virtue of this agreement, Triangle is obligated to make suspension payments to those employees so covered.

SO ORDERED.

Dated: New York, New York
September 14, 1978

LAWRENCE W. PIERCE

Lawrence W. Pierce
U. S. D. J.

APPENDIX B
ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This action was tried to the Court on January 13, 1978, and an Opinion was issued on September 14, 1978. It was held that the members of the New York Typographical Union were entitled to receive "suspension pay" from the defendant pursuant to the labor agreements which were in effect at the time the defendant suspended the operations of the Morning Telegraph, a racing news publication. It was also held that the defendant was not liable for pension payments, vacation payments or sick payments. The parties are now in dispute as to the amount of recovery to which the union's members are entitled. Additionally, the plaintiff has moved for reconsideration of the Court's determination that the defendant was not liable for pension, vacation or sick payments.

Suspension Payments

There are two labor agreements which are relevant to the determination of what amount may be recovered as suspension payments. The first agreement was executed on June 12, 1970 and is entitled "Scale of Prices". Later a second agreement referred to as the "Supplemental Agreement" was discussed by the parties and, although it was not formally adopted, was unilaterally put into effect by the defendant.

In the Opinion of this Court dated September 14, 1978, it was determined that the members of the union were entitled to suspension pay. Under the Scale of Prices agreement, the employees of the defendant were to receive the equivalent of eight weeks wages.

The Supplemental Agreement contains a section entitled "Relocation Severance Pay" which sets forth a

graduated scale of payment. Employees of the Morning Telegraph are entitled to receive payment under this provision in the event that the defendant moved the operations of the Morning Telegraph outside New York City rather than permanently suspending its activities. The last paragraph of this agreement states that "[t]he provisions of this section shall likewise be applied to Section 27." This reference is apparently to Section 27 of the Scale of Prices agreement discussed above.

The issue presented by the parties now is whether the plaintiff's recovery should be based on the provisions of Section 27 of the Scale of Prices agreement or on the formula contained in the "Relocation Severance Pay" section of the Supplemental Agreement. The plaintiff contends that the reference of the last paragraph of the relocation severance pay section of the Supplemental Agreement to Section 27 indicates that the formula for calculating relocation severance pay was also intended to be used to calculate suspension pay under Section 27, thereby replacing the original formula for calculating suspension pay. The defendant contends that no modification of the terms contained in the Scale of Prices should be found unless it is explicitly stated in the Supplemental Agreement.

The Supplemental Agreement's provision relating to relocation severance pay contains no specific reference to suspension pay, but rather generally refers to Section 27. The only matter discussed in both Section 27 and the Relocation Severance Pay section of the Supplemental Agreement is vacation benefits and the time that such benefits accrue. Suspension pay under Section 27 and relocation severance pay are independent and distinct matters, and the right to each of these arises under different circumstances.

The general nature of this reference implies that unless specifically stated, the provisions of the relocation

severance pay section of the Supplemental Agreement do not supplant the provisions of Section 27 of the Scale of Prices agreement, but rather supplement or add to that earlier agreement. A conclusion to the contrary would have the effect of substantially modifying the provisions of the earlier agreement for suspension pay based on mere conjecture as to the intent of the parties at the time the Supplemental Agreement was drafted.

Moreover, this Court expressly determined that plaintiff's members were not entitled to relocation severance pay. Unless there is clear evidence that the provision for suspension pay was intended to be modified by the Supplemental Agreement, plaintiff should not be allowed to recover the equivalent of what would have been obtained as relocation severance pay.

Prejudgment Interest

In actions brought under section 301 of the Labor Management Relations Act, 29 U.S.C. §185, prejudgment interest may be awarded in the discretion of the Court. *Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975). *cert. denied*, 429 U.S. 825 (1976). The objective of the award of prejudgment interest is "to make whole the party injured by the breach, but in appropriate circumstances, compensatory principles 'must be tempered by an assessment of the equities.' " *Id.* at 447 (citations omitted). Factors such as inordinate delay or wrongdoing by the plaintiff should be considered. *Id.*

The events which constituted the basis of this action took place in 1972. A complaint was filed on June 21, 1974. The record of this lawsuit indicates that since the filing of the complaint, plaintiff has been less than diligent in its prosecution. By order dated January 31, 1977, this Court dismissed the complaint without prejudice because of plaintiff's failures with respect to prosecution and com-

pliance with the orders of the court. On March 9, 1977, the plaintiff was permitted to reinstate the complaint on the condition that it promptly go forward with prosecution and timely submit pretrial documents. In spite of the Court's accommodation of the plaintiff, the Court was compelled to impose sanctions on the plaintiff for failure to comply with its orders and to warn it of further sanctions in an order dated July 21, 1977.

The equities are such that the plaontiff should not be permitted to recover prejudgment interest. This action was not filed until June 22, 1974 although the events upon which it was based took place in 1972. Under these circumstances, prejudgment interest should not be imposed against the defendant during this period. Similarly, the defendant should not be assessed interest for the pretrial delays caused by the plaintiff.

Motion to Amend Order

The plaintiff has moved to amend the Opinion of this Court dated September 16, 1978 to the extent that it finds that the defendant was not liable for pension payments, sick pay or vacation pay. The plaintiff contends that the rights of union members to receive income under the provision for a Pension Plan, as described in the Supplemental Agreement, were vested upon their becoming eligible to receive such payments. However, the provision for this plan states that "[t]he Pension Plan will not be terminated or modified during the life of the collective bargaining agreement without mutual consent." (Supplemental Agreement at p. 10). The language of this provision implicitly suggests that the plan may be terminated upon the expiration of the Supplemental Agreement. As determined in the earlier Opinion of this Court, the agreement terminated when the defendant suspended the operations of the Morning Telegraph. Moreover, the agreement provides that the Pension Plan would not be

funded. Payments of benefits were to be made from the general funds of the Morning Telegraph. When the Morning Telegraph ceased to exist, no further payments could be made from its general funds. The Plan must, therefore, have been intended to terminate when the Morning Telegraph ceased its operations. Consequently, the defendant is not liable for pension payments which plaintiff claims to have accrued after the date of suspension of operations. However, any rights to pension payments which accrued prior to the suspension of operations and which were not paid remain vested and must be included in plaintiff's recovery.

With respect to sick pay and vacation pay, any rights which vested prior to the termination of the operations of the Morning Telegraph must be recovered by the plaintiff. Section 26 and 51 of the Scale of Prices agreement provide for such vesting of interest and the defendant has not raised serious argument in opposition.

The Opinion of this Court dated September 19, 1978 is hereby modified and amended to conform to this order. The plaintiff is hereby ordered to submit judgment on five days notice within thirty days of the date of this order. This matter is ordered placed on the suspense calendar of this Court pending submission of judgment.

SO ORDERED.

Dated: New York, New York
December 29, 1978

LAWRENCE W. PIERCE

Lawrence W. Pierce
U. S. D. J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

APPEARANCES:

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LAWRENCE W. PIERCE, D.J.

OPINION AND ORDER

On January 19, 1979, plaintiff herein moved pursuant to Local Rule 9(m) to reargue his previously denied applications for assessment of prejudgment interest against defendant and for an amendment to the Opinion of this Court dated September 16, 1978 so as to declare that members of the New York Typographical Union No. 6 are entitled to receive pension payments, sick pay, and vacation pay. Plaintiff further moved the Court to reconsider its determination that union members are entitled to receive "suspension payments" as per the formula contained in a document referred to as the "Scale

of Prices" rather than according to the terms contained in the document referred to as the "Supplemental Agreement". The motion to reargue was granted by order January 31, 1979. Upon consideration of the arguments raised on reargument, it is hereby ordered that the applications for prejudgment interest and to amend the prior Opinion of this Court dated September 16, 1978 vis-a-vis pension payments, sick pay, and vacation pay are denied for the reasons set forth in the order of this Court ordered December 29, 1978. In the discussion that follows, the further contentions of the parties concerning the proper formula for determining suspension pay are addressed.

Suspension Payments

The issue to be resolved here is whether eligible members of the union are to receive suspension payments according to the terms set forth in the Scale of Prices or according to the formula contained in the section of the Supplemental Agreement entitled "Relocation Severance Pay". Plaintiff contends that the Supplemental Agreement contains the proper prescription while defendant contends that the Scale of Prices set forth the correct terms.[1]

In support of his position, plaintiff had previously referred only to the last paragraph of the Relocation Severance Pay section of the Supplemental Agreement which states that "[t]he provisions of this section shall likewise apply to Section 27." Section 27 of the Scale of Prices sets forth the eight-week pay formula which defendant contends applies here. That general reference to Section 27, plaintiff contended, denoted the intent to replace the formula contained in Section 27 of the Scale of Prices with the formula contained in the Relocation Severance Pay section of the Supplemental Agreement.

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[1] The Scale of Prices was the original labor agreement between defendant and the Union, the terms of which exclusively governed entitlement to and the amount of suspension pay. Upon expiration of that agreement, a second agreement, the Supplemental Agreement, was discussed. Although it was never formally adopted by both defendant and the union, the terms of that agreement were unilaterally put into effect by the defendant.

On the issue of defendant's liability under either agreement, this Court had previously held that eligible union members were not entitled to receive relocation severance pay under the Supplemental Agreement, but were entitled to receive suspension pay under the Scale of Prices. Accordingly, on the issue of the correct formula for calculating suspension pay this Court was concerned that union members not receive the equivalent of relocation severance pay unless there was clear contractual language to that effect. Since the reference to Section 27 in the Relocation Severance Pay section of the Supplemental Agreement was general and vague and may have been intended merely to supplement rather than replace the provisions of Section 27, the Court held that the correct formula was that contained in Section 27 of the Scale of Prices.

On reargument, plaintiff brought to the Court's attention for the first time an unexecuted addendum to the Supplemental Agreement entitled "Memorandum Severance Pay Saturday Edition Morning Telegraph."[2] This two-paragraph document provides in pertinent part that "[i]n the event of a merger, consolidation, or *permanent suspension of the entire newspaper* the severance pay obligation of the Publisher will be set forth in (C) Relocation Severance Pay." (Emphasis added.) Although unexecuted, for the reasons set forth hereinbelow, it is apparent to the Court that the memorandum was intended to be incorporated into the Supplemental Agreement. Defendant has not raised argument to the contrary.

Plaintiff contends that this memorandum is a clear expression of the intent to supercede the formula contained in Section 27 of the Scale of Prices with the terms set

[2] Both the Supplemental Agreement and the memorandum were received into evidence at trial.

forth in the Supplemental Agreement. The defendant contends that the memorandum only indicates that the terms of Section 27 were to be replaced by the terms in the third paragraph of the Reolcation Severance Pay section of the Supplemental Agreement.

In support of its contention, defendant notes that the memorandum refers to "*(C)* Relocation Severance Pay." Since the sections of the Supplemental Agreement are not denominated by letter but only by title, the reference to "(C)", defendant contends, is only to the *third paragraph* of the section entitled "Relocation Severance Pay" rather than the whole section.

The Court notes however that the paragraphs of that section are also not denominated by letter or by any other index. While defendant's contention is a possible explanation of the inclusion of "(C)" in the reference to the relocation severance pay section of the Supplemental Agreement, it is more probable that the insertion of "(C)" was a printing error rather than a limitation of the reference to the third paragraph of the Relocation Severance Pay section. Such a particularized reference as defendant contends was intended would or should have been expressly stated instead of being left to judicial conjecture.

Accordingly, it is the opinion of this Court that the reference in the memorandum entitled "Memorandum Severance Pay Saturday Edition Morning Telegraph" to "(C) Relocation Severance Pay" is to the *entire* section of the Supplemental Agreement entitled "Relocation Severance Pay" and not merely to the third paragraph of that section. Eligible members of the union are entitled to receive suspension pay pursuant to the terms set forth in the Relocation Severance Pay section of the Supplemental

Agreement.[3] Therefore, the Order of this Court dated December 29, 1978 is hereby ordered amended in accordance with this Opinion and Order.

The plaintiff is hereby ordered to submit judgment on five days notice within thirty days of the entry of this Order and Opinion.

SO ORDERED.

Dated: New York, New York
April 24, 1979

LAWRENCE W. PIERCE

Lawrence W. Pierce
U. S. D. J.

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[3] Upon granting of the motion to reargue, plaintiff submitted an affidavit from David W. Crockett in support of his position. Defendant has moved to strike that affidavit on the grounds that it is untimely, that it is outside the scope of the record, and that it is inaccurate and misleading. In the alternative, the defendant moves for the Court's consideration of the affidavit of William H. William. The motion to strike the affidavit of David W. Crockett is granted. The affidavit of David W. Crockett and William H. William have not been considered by this Court with respect to the issues raised by the parties or for any other purpose.

APPENDIX D

OPINION AND ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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LAWRENCE W. PIERCE, D.J.

Defendant herein, Triangle Publications, Inc. ("Triangle"), brings this motion to reargue certain findings and determinations of this Court rendered after a non-jury trial of this action. It contends that this Court erred in determining that defendant was liable to former employees of the Morning Telegraph ("MT") who were members of the New York Typographical Union, No. 6 ("Union") for "suspension payments" under the labor contract in dispute. No claim for suspension payments, defendant contends, was either asserted by plaintiff prior to or during the trial of this action or litigated. Defendant also contends that the Court erred in denying its

counterclaim for damages it allegedly suffered as a result of a strike by members of the Union. For the reasons that follow, the Opinion of this Court dated September 14, 1978 is hereby modified and amended to provide that plaintiff's claim for suspension payments must be denied since this claim was not asserted by plaintiff until after conclusion of the trial and because defendant was not afforded the opportunity to fully litigate this issue.

Facts

On June 21, 1974, plaintiff commenced this action on behalf of the Union against Triangle pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. §185. The complaint alleged that defendant: (1) refused to recognize the Union as the labor representative of certain employees of the Daily Racing Form ("DRF"), a newly-established racing publication which is owned by Triangle and is located in New Jersey; (2) refused to permit employees of the MT who were members of the Union to transfer to the DRF in New Jersey; (3) refused to provide "relocation severance payments" to employees of the MT who were members of the Union; and (4) refused to provide vacation payments to those employees; and (5) refused to provide pension payments to such employees who were qualified. Under the express terms of the contract in dispute, "relocation severance payments" were to be made by Triangle in the event that it transferred its publication operations from the MT in New York to the DRF in New Jersey or elsewhere. An amended complaint was filed on February 6, 1975 wherein these claims were reasserted. Neither the original complaint nor the amended complaint asserted a claim for "suspension payments" for which, under the express terms of the contract in dispute, the defendant was liable in the event that the operations of the MT were permanently suspended. Defendant opposed plaintiff's claims

and interposed its own counterclaim for damages it allegedly suffered as a result of a strike of the MT by the Union[1]

A "Proposed Pre-Trial Order" was filed by plaintiff on March 21, 1977, and thereafter a "Joint-Consent Pre-Trial Order" was stipulated to by the parties. In these pre-trial submissions, plaintiff reiterated the claims set forth in the complaint as amended. Again, no claim was asserted by plaintiff for suspension payments. The defendant's defenses to the asserted claims included its contention that the strike conducted by the Union against the MT constituted a breach of the contract in controversy.

Trial of this action was commenced on January 13, 1978. In his opening statement, counsel for plaintiff indicated that recovery was being sought for "relocation severance pay, unused sick leave and unused vacation credits." (Trial Transcript at p.3). Plaintiff's counsel failed once again to assert a claim for suspension payments.

During the course of the trial, *several undisputed* facts were established which related to the issue of whether defendant is liable for suspension payments. The Court notes however that the evidence which was offered in support thereof was submitted by the parties, it appears, primarily with regard to the issue of defendant's liability for relocation severance payments rather than for suspension payments. For example, defendant admitted that it suspended publication of the MT and that it had made suspension payments to employees who were members of other unions pursuant to contracts similar to the contract

[1] The findings of fact and conclusions of law rendered by this Court regarding the claims expressly raised by plaintiff and the counterclaim raised by defendant will not be restated. See Opinion dated September 14, 1978.

in controversy. (Trial Transcript at pp.18-19, 245-47, 493). However, these admissions were *apparently* offered to support defendant's contention that it was not liable for relocation severance pay because the operations of the MT were terminated and not relocated. It did not admit that it was liable for suspension payments. Also, evidence and testimony was received by the Court regarding the formula employed by defendant in calculating the amount of suspension payments which was paid to other employees. (Trial Transcript at pp. 110, 754-59). Defendant also *alluded* to defenses that it would raise with respect to any claim by plaintiff for suspension payments during the course of the trial. (Trial Transcript at pp. 828-32). These defenses, however, were never explicitly stated as such during the course of the trial.

At the conclusion of the trial, the parties were instructed to submit post-trial papers. Plaintiff asserted his claim for suspension payments *for the first time* in this post-trial papers which were *belatedly submitted.*

On September 14, 1978, this Court issued an Opinion in which it determined that: (1) defendant was not liable for relocation severance payments; (2) that the Union did not materially breach the labor contract by holding a strike of the MT; (3) that defendant had failed to prove that it suffered any damage as a result of the strike; (4) that defendant had suspended operation of the MT within the meaning of the labor contract; and (5) that defendant was liable for suspension payments. It was also determined that defendant was not liable for pension payments, vacation payments or sick-leave payments. By Order dated December 29, 1978, the Court amended the earlier Opinion to provide that defendant was not liable for pension payments, vacation payments and sick-leave payments in excess of the amounts which had accrued up to and including the date of suspension of publication of the MT.

Opinion and Order

On May 11, 1979, defendants moved for reargument of the Court's determination that it was liable for suspension payment and that plaintiff was not liable for any damages defendant allegedly suffered as a result of the strike. The motion was granted on August 13, 1979, and the parties were requested to submit memoranda in support of their respective positions.

Suspension Payments

The issue raised by this motion for *reargument* is whether the Court should have adjudicated plaintiff's claim for suspension payments under the circumstances. Although defendant has not asserted this issue as such in its notice of motion for reargument, the *issue is manifest* in defendant's contentions that plaintiff's claim for suspension payments was not raised prior to or during trial and that there is insufficient evidence in the record to support this claim.

Rule 15(b) of the Federal Rules of Civil Procedure is particularly relevant to the resolution of this issue. It provides, in pertinent part, that:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

Leave to amend the pleadings under this rule should be freely granted when, in the court's discretion, justice requires. Absent apparent reasons such as undue delay, repeated failure to cure deficiencies by amendments pre-

viously allowed or undue prejudice to the opposing party, leave to amend should be granted. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962).

However, issues which are merely inferentially raised by the evidence may not be asserted belatedly by an application to amend the pleadings under this rule. "The purpose of Rule 15(b) is to allow the pleadings to conform to issues *actually tried*, not to extend the pleadings to introduce issues *inferentially suggested* by incidental evidence in the Records." (Emphasis added.) *Browning Debenture Holders' Committee* v. *DASA Corp.*, 560 F.2d 1078, 1086 (2d Cir. 1977).

The factors the court must consider under this rule are whether the proposed claim was tried by the parties' express or implied consent and whether the defendant "would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory." *Id.* (citing 3 Moore's Federal Practice ¶15.13[2], at 993 (2d ed. 1966). The circumstances presented in this action must be measured against the standards set forth above.

In the present case, plaintiff's efforts to assert a claim for suspension payment were minimal, at best. He did not assert this claim in his original complaint or in the amended complaint and has not expressly sought to amend his pleadings at any time. Moreover, neither the "Proposed Pre-Trial Order" filed by plaintiff nor the "Joint-Consent Pretrial Order" submitted to the Court by the parties presents such a claim. Finally, it appears that plaintiff did not assert a claim for suspension payments at any time during the course of the trial. Plaintiff has had

numerous opportunities to frame this claim for trial.[2] Under these circumstances, the Court finds that there is ample evidence of undue delay by the plaintiff in asserting this claim, as well as of his repeated failure to remedy the omission of this claim from the complaint.

Also, a review of the trial transcript indicates that this claim was not actually litigated and that, in any case, defendant did not expressly or impliedly consent to trial of the claim. Although evidence which tends to support this claim was presented during the course of the trial, such evidence was offered with respect to the issue of whether defendant was liable for relocation severance payments. Plaintiff's claim for suspension payment was inferentially interposed, at best, by the introduction of this evidence. Since this claim was not actually litigated, defendant cannot be said to have expressly or impliedly consented to trial of this issue. Moreover, during the trial, defendant alluded to defenses it would assert to a claim for suspension payments if such a claim had been in issue. If defendant had consented to trial of plaintiff's claim for suspension payments, one must reasonably *assume* that it would have affirmatively asserted its defenses rather than merely alluding to those defenses. If this Court were to permit plaintiff to amend his complaint to assert a claim for suspension payments, the trial having been concluded, the defendant would be substantially prejudiced since it would be deprived of an opportunity to present its defenses to this claim. Therefore, since Rule 15(b) does not allow pleadings to be amended to assert claims which were merely "inferentially suggested by incidental evidence in

[2] The Court notes that on January 31, 1977, the complaint herein was dismissed because of plaintiff's failure to prosecute this action and to comply with prior orders of this Court. The action was restored thereafter upon condition that plaintiff comply with the Court's directive. Still later, on July 21, 1977, the Court imposed a sanction in the amount of $250 upon the plaintiff for his failure to comply with the Court's orders.

the Record" and since plaintiff did not consent to trial of this claim and would be substantially prejudiced if the amendment were allowed, plaintiff's claim for suspension payments must be denied.

Defendant's Counterclaim

Defendant's remaining contentions regarding denial of its counterclaim for damages it allegedly suffered as a result of the strike of the MT is without support. Its claim for such damages is denied for the reasons stated in the Opinion of this Court dated September 14, 1978.

CONCLUSION

The Opinion of this Court dated September 14, 1978 is hereby ordered modified and amended to provide that plaintiff's claim for suspension payments is denied. Plaintiff shall submit order on five days notice.

SO ORDERED

Dated: New York, New York
December 20, 1979

LAWRENCE W. PIERCE

Lawrence W. Pierce
U. S. D. J.

APPENDIX E
ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

This application for reargument of the Opinion and Order of this Court dated December 20, 1979 is a further effort by plaintiff to avoid the consequences of his failure to properly and timely assert a cause of action for suspension payments in his complaint or at any other time during the prosecution of this action. As indicated in the decision of this Court which plaintiff seeks to reargue, the complaint, pre-trial order, and transcript of the trial of this action is devoid of any claim for suspension payments. Plaintiff had asserted a claim for relocation severance pay, but no claim for suspension payments was raised. Since the right to suspension payments is mutually exclusive of the right to relocation severance payments under the contract indispute, a claim for relocation severance payments does not subsume or encompass a claim for suspension payments. Accordingly, plaintiff cannot be said to have impliedly asserted a claim for suspension payments.

For the reasons set forth in the Opinion and Order of this Court dated December 20, 1979 and the reasons set forth above, the motion to reargue is denied.

SO ORDERED.

Dated: New York, New York
March 10, 1980

LAWRENCE W. PIERCE

Lawrence W. Pierce
U. S. D. J.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18 day of December one thousand nine hundred and eighty.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

80-7430,70

Present: Hon. J. Edward Lumbard
Hon. William H. Mulligan
Hon. Ellsworth A. Van Graafeiland
Circuit Judges,

New York Typographical Union No. 6
Plaintiff-Appellant-Appellee,

—against—

Triangle Publications, Inc.
Defendant-Appellee-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinions of the Hon. Lawrence W. Pierce, No. 74 Civ. 2674 (September 14, 1978; September 21, 1978; December 19, 1978; April 24, 1979; December 20, 1979; March 10, 1980; and April 25, 1980).

J. Edward Lumbard
J. Edward Lumbard

William H. Mulligan
William H. Mulligan

E. A. Van Graafeiland
Ellsworth A. Van Graafeiland

APPENDIX G

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 10th day of February, one thousand nine hundred and eighty-one.

No. 80-7470
80-7430

NEW YORK TYPOGRAPHICAL UNION No. 6
Plaintiff-Appellant-Cross-Appellee

—against—

TRIANGLE PUBLICATIONS, INC.,
Defendant-Appellee-Cross-Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, cross-appellee, New York Typographical Union

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
A. Daniel Fusaro,
Clerk

APPENDIX H

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled action having been brought on for trial before the Court, Honorable Lawrence W. Pierce, United States District Judge, presiding, and the issues having been duly tried on January 13, 26, 30, 1978 and February 1, 3 and 8, 1978, and the Court having rendered its decision by an opinion and order dated September 14, 1978 and supplemental opinions and orders dated September 21, 1978, December 29, 1978, April 24, 1979, December 20, 1979 and March 10, 1980, constituting the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a), F.R.Civ. P., and the Court having directed the entry of judgment thereon, it is

ORDERED, ADJUDGED AND DECREED that plaintiff New York Typographical Union, No. 6, an unincorporated association having a place of business at 817 Broadway, New York, New York, recover of the defendant Triangle Publications, Inc., a Delaware corporation having its principal place of business at 250 King of Prussia Road, Radnor, Pennsylvania, the sum of One Hundred Forty-Nine Thousand, Three Hundred Eighty-Seven and 02/100 ($149,387.02) Dollars on its claims for vacation and sick pay credits, and that plaintiff have execution therefor; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff's remaining claims and defendant's counterclaims be dismissed.

Dated: New York, N. Y.
April 16, 1980

LAWRENCE W. PIERCE
U.S.D.J.

Judgment entered 4/25/80

RAYMOND F. BURGHARDT
Clerk

APPENDIX I

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, complaining of defendant, by his attorney, alleges:

AS AND FOR A FIRST CAUSE OF ACTION
ON BEHALF OF PLAINTIFF

First: Plaintiff NEW YORK TYPOGRAPHICAL UNION NO. 6 (hereinafter the "Union") is an unincorporated association with its principal place of business located in the City, County and State of New York, consisting of more than seven (7) members and exists for the purpose of representing composing room employees for collective bargaining; and has, for a great number of years, represented employees of defendant, employed by its Morning Telegraph Division in its composing room.

Second: Defendant TRIANGLE PUBLICATIONS, INC. (hereinafter "Triangle"), upon information and belief, is a Delaware Corporation, and, at all times hereinafter mentioned, was the owner of real property located in the City, County and State of New York; and the owner of a publication called The Morning Telegraph (hereinafter "Telegraph"), as well as other publications that deal in information relating to horse racing, betting odds, handles, past performances and stakes.

Third: The Union and the Telegraph were parties to a collective bargaining agreement (hereinafter referred to

as the "Agreement"), for a term commencing July 26, 1970 and ending on March 30, 1973, which Agreement covered the terms and conditions of employment of composing room employees of the Telegraph, located in the city of New York; and which agreement was executed in, and was wholly to be performed within the State of New York.

Fourth: The Agreement provided, in part, the following:

> "Should the Publisher remove The Morning Telegraph composing room operation to another location, either within or without the geographical jurisdiction of New York Typographical Union No. 6, the Publisher shall continue to recognize New York Typographical Union No. 6 as the bargaining representatives for composing room employees as defined by the jurisdictional provisions of this contract."

Fifth: During the term of the Agreement, and on or about October 25, 1971, Triangle commenced the publication of The Daily Racing Form (hereinafter "Racing Form") at its plant in Hightstown, New Jersey, a publication that also deals in information relating to horse racing, betting odds, handles, past performances and stakes.

Sixth: Upon commencement of publication of the Racing Form by Triangle, racing information, that theretofore had been published by Triangle in the Telegraph, no

longer was published in the Telegraph, but was published by Triangle in the Racing Form; and at said time, a number of composing room employees of the Telegraph were laid off from their employment; *and that thereafter, defendant Triangle completely closed down its Triangle operations, at which time the services of the remaining composing room employees were terminated.*

Seventh: Triangle refused to recognize the Union as the representative of composing room employees at Triangle's Hightstown, New Jersey facilities, in breach of its contractual obligations to do so.

Eighth: The plaintiff Union, by reason of Triangle's breach of the terms of the collective bargaining agreement, has been damaged by the loss of dues, fees and initiation fees in the sum of $1,000,000; and it has suffered further damage by the loss of contributions to its several trust funds that the Telegraph was required to make contributions to, under the terms of the Agreement, in the amount of $5,000,000.

AS AND FOR A SECOND CAUSE OF ACTION
ON BEHALF OF PLAINTIFF

Ninth: Plaintiff repeats and realleges the allegations of the complaint contained in paragraphs "First" through "Seventh" hereinabove with the same force and effect as though fully set forth herein.

Tenth: That the Agreement between the Union and Telegraph provided, in part, that the composing room

employees of Telegraph had the right to transfer their employment to defendant's facilities in Hightstown; and that composing room employees gave notice to defendant that they intended to exercise said right, but defendant refused to so transfer their employment.

Eleventh: That by reason of Triangle's failure and refusal to accept transfer of employment of its Telegraph employees employed in the composing room to its Hightstown facilities, said employees were denied the right of continuance of their employment, in breach of said Agreement.

Twelfth: That by reason of said breach, said employees were damaged in the sum of $50,000,000.

AS AND FOR A THIRD CAUSE OF ACTION
ON BEHALF OF PLAINTIFF

Thirteenth: Plaintiff repeats and realleges the allegations of the complaint contained in paragraphs "First" through "Seventh" hereinabove with the same force and effect as though fully set forth herein.

Fourteenth: That said Agreement between the Union and the Telegraph provided for the payment of "Relocation Severance Pay" to composing room employees employed by Triangle who did not transfer to the new plant, on the basis of two and one half (2½) weeks' pay for each year of service with the Telegraph, plus three (3) additional weeks' pay at the time the composing room moved out of New York City.

Fifteenth: Defendant has failed and refused to pay said relocation severance pay to the composing room employees, as provided for in the Agreement, all to their damage in the sum of $5,000,000.

AS AND FOR A FOURTH CAUSE OF ACTION
ON BEHALF OF ACTION

Sixteenth: Plaintiff repeats and realleges the allegations of the complaint contained in paragraphs "First" through "Seventh" hereinabove with the same force and effect as though fully set forth herein.

Seventeenth: The contract between the Union and the Telegraph provided for the payment to composing room employees employed by defendant of vacations in 1972, based upon credits earned for the same in 1971, and the right to such vacations accrued as of December 31, 1971; and said Agreement further provided for vacation credits for work performed in 1972.

Eighteenth: Defendant has failed and refused to pay to said composing room employees the vacation credits earned in 1971 and 1972, all to their damage in the sum of $500,000.

AS AND FOR A FIFTH CAUSE OF ACTION
ON BEHALF OF PLAINTIFF

Nineteenth: Plaintiff repeats and realleges the allegations of the complaint contained in paragraphs "First"

through "Seventh" hereinabove with the same force and effect as though fully set forth herein.

Twentieth: The Agreement between the Union and the Telegraph provided for the payment by defendant of pensions to its composing room employees who qualified therefor, in amounts ranging up to $50.00 per month.

Twenty-First: Defendant has failed and refused to pay monthly pensions to said employees who qualified therefor, all to their damage and prospective damage in the sum of $250,000.

WHEREFORE, plaintiff Union demands judgment on the First Cause of Action in the amount of $6,000,000; on the second Cause of Action in the amount of $50,000,000; on the Third Cause of Action in the amount of $5,000,000; on the Fourth Cause of Action in the amount of $500,000; and the Fifth Cause of Action in the amount of $250,000; for a total of $61,750,000; together with the costs and disbursements of this action, and for such other and further relief as the Court may deem just and proper.

.....

JOHN J. SHEEHAN
Attorney for Plaintiff
51 Chambers Street
New York, New York 10007
(212) CO 7-2022

APPENDIX J

DEFENDANT'S ANSWER AND COUNTERCLAIM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

AS AND FOR A FIRST DEFENSE

Defendant admits the allegations of the first, second and fifth paragraphs of the Amended Complaint; makes no response to the allegations of the fourteenth, seventeenth and twentieth paragraphs of the Amended Complaint which paragraphs purport to characterize the contents of written documents, which documents speak for themselves; admits the averments of the third paragraph except denies that the term of said collective bargaining agreement commenced July 26, 1970, and on the contrary, alleges that the term thereof commenced March 31, 1970; as to the fourth paragraph admits only that the quoted language appeared in a "Supplemental Agreement" which was never executed by plaintiff Union; as to the seventh paragraph, admits only that defendant refused to recognize plaintiff Union as the representative of employees at defendant's Hightstown, New Jersey facilities; and denies each and every other allegation contained in the Amended Complaint.

AS AND FOR A SECOND DEFENSE

Twenty-Second: The Amended Complaint fails to state a claim upon which relief may be granted.

AS AND FOR A THIRD DEFENSE

Twenty-Third: Plaintiffs failed and refused to execute the Supplemental Agreement, upon which they purport to rely in this action, after the same had been negotiated, and said Supplemental Agreement is of no force and effect.

AS AND FOR A FOURTH DEFENSE

Twenty-Fourth: Plaintiffs are estopped to rely upon the aforesaid Supplemental Agreement after having failed and refused to execute the same.

AS AND FOR A FIFTH DEFENSE

TWENTY-FIFTH: In the alternative, the contract provisions upon which plaintiffs purport to rely were void and illegal *ab initio* as plaintiffs well knew by reason of defendant's prior recognition of an agreement with Trenton Local 71 of the International Typographical Union.

AS AND FOR A SIXTH DEFENSE

Twenty-Sixth: In the alternative, defendant's obligations under the Supplemental Agreement which plaintiffs here seek to enforce were conditioned upon the occurrence of a condition precedent, to wit, the removal of the Morning Telegraph ("MT") composing room operation to another location. That event and condition precedent has never occurred.

Defendant's Answer and Counterclaim

AS AND FOR A SEVENTH DEFENSE

Twenty-Seventh: Defendant's Hightstown, New Jersey facility was opened and operated commencing October 13, 1969 as a research and development facility. For many years prior to that date, both the Daily Racing Form ("DRF") and the MT had been published and sold as two separate and distinct racing newspapers throughout the country, each having its own separate and autonomous operating management.

Twenty-Eighth: Commencing November 1, 1969 defendant was party to a collective bargaining agreement with Trenton Local 71 of the International Typographical Union, covering the employees at its Hightstown facility, which agreement contained many provisions similar to those contained in the collective bargaining agreement between defendant and plaintiff Union, another local of the International Typographical Union.

Twenty-Ninth: Commencing October 25, 1971 defendant revived the eastern edition of the DRF which previously had been published, and published said eastern edition at its Hightstown, New Jersey facility.

Thirtieth: Both the plaintiff Union and Trenton Local 71 were and are subordinate locals of the International Typographical Union and subject to its Constitution and by-laws.

Thirty-First: From and after October 25, 1971 defendant published both the DRF at Hightstown, while at the same time the MT was published at New York City with its own separate operating management and editorial staff. Defendant planned, intended and was committed to continue publishing both publications at both locations, such commitment having been communicated by

defendant not only to plaintiff Union, but also to the other unions representing employees at defendant's New York City MT facility.

Thirty-Second: Although both the DRF and the MT published information relating to horse racing, betting, odds, handles, past performances and stakes, the MT differed materially from the DRF in that the MT had a distinct masthead, sold at all horse racing tracks in the New York metropolitan area and contained theatre and movie listings and reviews. The Morning Telegraph would have continued to publish its newspaper in New York City notwithstanding defendant's publication of the DRF at Hightstown but for plaintiffs' unlawful conduct as set forth in paragraphs forty-first through fifty-fourth of defendant's Counterlaim which prevented and caused the suspension and termination of publication of the MT in New York City. Defendant's Hightstown facility contained no composing room in the traditional sense in which skills of MT composing room employees would be readily adaptable.

Thirty-Third: No MT composing room employees were laid off by reason of publication of the DRF at Hightstown, New Jersey. Approximately fifteen to twenty MT composing room employees were temporarily laid off in December 1971 and January 1972 as part of a normal seasonal adjustment by virtue of the slack in racing activity at that time of year. All such laid off employees worked as substitutes during the lay-off and were recalled to active status a month or so later.

AS AND FOR AN EIGHTH DEFENSE

Thirty-Fourth: Plaintiffs presented their claims herein to the International Typographical Union under the

procedures which were required as part of the MT collective bargaining agreement upon which plaintiffs purport to base this action.

Thirty-Fifth: The International Typographical Union having determined by a vote of its members, which vote is binding on plaintiffs, that plaintiff Union did not have jurisdiction over defendant's employees at defendant's Hightstown, New Jersey facility, plaintiffs are barred and estopped (a) to allege entitlement to represent said Hightstown employees and (b) to maintain this action.

AS AND FOR A NINTH DEFENSE

Thirty-Sixth: On April 2, 1972 plaintiffs wrongfully struck and picketed the MT in breach of their Agreement, coerced and influenced members of Local 3 of the Newspaper Guild of New York to walk off their jobs at the MT, and harrassed other employees of the MT who attempted to cross plaintiffs' picket-line. Defendant incorporates herein the averments of paragraph forty-first through fifty-fourth of its Counterclaim as though fully set forth.

AS AND FOR A TENTH DEFENSE

Thirty-Seventh: In the alternative, defendant is entitled to set-off against any amounts adjudged due and owing against defendant those amounts claimed in defendant's Counterclaim, the averments of which are incorporated herein by reference as though fully set forth.

AS AND FOR AN ELEVENTH DEFENSE

Thirty-Eighth: Plaintiffs breached and repudiated the Agreement and Supplemental Agreement in that:

(a) Plaintiffs engaged in a jurisdictional strike in violation of their contractual agreement not to strike;

(b) Plaintiffs failed to exhaust their contractual remedies before striking; and

(c) Plaintiffs engaged in massive picketing and violence against defendant.

AS AND FOR A TWELFTH DEFENSE

Thirty-Ninth: Provisions in the unexecuted Supplemental Agreement purporting to grant plaintiff Union or its members' rights at defendant's Hightstown facility are void and illegal.

COUNTERCLAIM

AS AND FOR A FIRST CAUSE OF ACTION

Fortieth: Defendant incorporates herein the averments of paragraphs twenty-third through thirty-ninth of its Answer as though fully set forth.

Forty-First: Plaintiffs and defendant were parties to a collective bargaining agreement effective March 31, 1970 through March 30, 1973 covering members of plaintiff Union employed at Defendant's MT plant in New York City.

Forty-Second: Section 4 of the Agreement provided in pertinent part:

> "It is the intention and desire of the parties hereto that no strike or other interruption of normal employment or production shall occur during the life of this Agreement. To this end the Union and the Publishers commit themselves to the orderly settlement of disputes as provided herein. . . . The Union agrees that it will not support a strike or work stoppage under any other circumstances."

Forty-Third: On April 2, 1972 plaintiffs unlawfully and without justification or excuse, commenced a strike against defendant in violation of the aforesaid provision with the deliberate purpose and design of damaging and disrupting defendant's business and without resort to contractual remedies for the settlement of disputes.

Forty-Fourth: On April 6, 1972 plaintiffs engaged in massive picketing and violence to prevent defendant's other employees from working for defendant and thereafter continued to picket the premises at 525 West Fifty-Second Street, New York City, until October 1, 1973.

and October 1, 1973.

Forty-Fifth: Plaintiffs' strike and related conduct was illegal in that, *inter alia*, it constituted a breach of the contract, plaintiffs had not exhausted grievance and ap-

peal procedures provided by the contract, plaintiffs' claims were barred by the pre-existing contract between defendant and Trenton Local 71, there had been no relocation of the MT composing room operation, plaintiffs ignored available peaceful and appropriate legal remedies, and plaintiffs' strike was accompanied by massive restraints, coercion, violence and criminal behavior which repudiated the contract and freed defendant from any obligations thereunder.

Forty-Sixth: As a result of the aforesaid strike, picketing and violence, defendant was forced to permanently suspend operations at the MT and sell all its assets at distress prices, all to the substantial injury and damage of defendant.

Forty-Seventh: By reason of plaintiffs' breach of the Agreement, defendant's MT business has been disrupted and destroyed and defendant has sustained substantial damage including loss of sales, profits and goodwill, established over a period of 138 years, in an amount in excess of $100,000,000.

AS AND FOR A SECOND CAUSE OF ACTION

Forty-Eighth: On October 25, 1971 defendant commenced publication of the Daily Racing Form at its facility in Hightstown, New Jersey.

Forty-Ninth: Hightstown, New Jersey is outside the New York metropolitan area as defined by Section 3 of the aforesaid Agreement.

Fiftieth: Defendant's Hightstown employees were represented by Trenton Local 71, which was a subordinate local of the International Typographical Union, as was plaintiff Union.

Fifty-First: Since September 1970 plaintiff Union has repeatedly and unlawfully demanded to be recognized as the representative of employees at defendant's Hightstown facility for the purposes of collective bargaining although plaintiff Union had no contractual or other right to claim to be representative of said employees.

Fifty-Second: Despite a decision by the Executive Council of the International Typographical Union that plaintiffs' Union had no jurisdiction over defendant's Hightstown employees, on July 3, 1972 plaintiffs wrongfully commenced picketing defendant's facilities at Hightstown with the deliberate purpose and intent of disrupting and destroying defendant's business and coercing defendant's employees not to work for defendant.

Fifty-Third: Said picketing was renewed on December 6, 1972 and continued until October 1, 1973.

Fifty-Fourth: By reason of plaintiffs' wrongful picketing, defendant incurred substantial costs and expense including loss of production, income and goodwill for which defendant is entitled to compensatory and punitive damages in an amount in excess of $1,000,000.

Wherefore, defendant demands that plaintiffs' Amended Complaint be dismissed and that judgment be entered against plaintiffs and in favor of defendant on defendant's Counterclaims for compensatory and punitive damages in an amount in excess of $101,000,000.

ROBERT A. SWIFT
David H. Marion
Robert A. Swift

HAROLD E. KOHN, P.A., *Attorneys at Law*
1214 IVB Bldg.,
1700 Market Street
Philadelphia, PA 19103

February 27, 1975

ROGERS & WELLS

By: HERBERT C. EARNSHAW
A Member of the Firm
200 Park Avenue
New York, N. Y. 10017
(212) 972-7000

Attorneys for defendant
Triangle Publications, Inc.

APPENDIX K

REPLY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs, in reply to defendant's counterclaim, contained in its' answer, allege:

1. Admit the allegations contained in paragraph: "Forty-First".

2. Admit that the quoted matter contained in paragraph "Forty-Second" is contained in paragraph 4 of the Agreement, but deny that the matter, as quoted, is complete or accurate. The plaintiffs respectfully refer the whole of said document to the Court for judicial interpreation.

3. Deny that allegations contained in paragraph "Forty-Third", except that they admit that a strike was commenced against defendant for the purpose of having the defendant abide by the terms of the Agreement between them; and allege that said strike was not in violation of the terms of the Agreement.

4. Deny the allegations contained in paragraph "Forty-Fourth", except admit that plaintiffs picketed defendant's premises in the period from April 6, 1972, and October 1, 1973.

5. Deny the allegations contained in paragraph "Forty-Fifth".

6. Deny the allegations contained in paragraph "Forty-Sixth".

Reply

7. Deny the allegations contained in paragraph "Forty-Seventh".

8. Admit the allegations contained in paragraph "Forty-Eighth".

9. Deny the allegations contained in paragraph "Forty-Ninth".

10. Deny the allegations contained in paragraph "Fiftieth", except admit that Trenton Local 71 represented research employees at Hightstown.

11. Deny the allegations contained in paragraph "Fifty-First", except admit that it has the right to represent production employees at the Hightstown facilities.

12. Deny the allegations contained in paragraph "Fifty-Second", except admit that it picketed the Hightstown facility on July 3, 1972, to publicize its dispute with defendant.

13. Deny the allegations contained in paragraph "Fifty-Third", except that it picketed the Highstown facility at various times between December 6, 1972 and October 1, 1973.

14. Deny the allegations contained in paragraph "Fifty-Fourth".

WHEREFORE, plaintiffs demand judgment dismissing the causes of action alleged in defendnants' counterclaim, together with the costs and disbursements of this action.

JOHN J. SHEEHAN
Attorney for Plaintiffs
51 Chambers Street
New York, New York
CO 7-2022

APPENDIX L

JOINT PRETRIAL ORDER
Excerpt

. . . Agreed Statement of Undisputed Facts

47. For the weeks ending March 22, 1972, and March 29, 1972, the composing room of MT had 109 full-time employees.

48. There were at least as many members of No. 6 employed in the composing room of MT in the last week of March, 1972, as there had been during the same week in 1971 and 1970.

49. Beginning on April 2, 1972, composing-room employees of MT struck MT and picketed its building in New York City.

50. During the first week of the strike, members of No. 6 picketed both entrances of the MT plant in New York City.

51. On April 3, 1972, management of MT notified No. 6 that No. 6 had breached any contracts existing between No. 6 and MT by the illegal strike action.

52. *On April 7, 1973,* (sic) *Triangle suspended publication of MT.*

Office-Supreme Court, U.S.
FILED
JUN 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1870

IN THE

Supreme Court of the United States

NEW YORK TYPOGRAPHICAL UNION NO. 6,
Petitioner,

v.

TRIANGLE PUBLICATIONS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

DAVID H. MARION,
ROBERT A. SWIFT,
KOHN, SAVETT, MARION & GRAF, P. C.,
1700 Market Street,
Philadelphia, Pa. 19103
(215) 665-9600
Attorneys for Respondent.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the District Court's ruling that certain supplemental, unfunded pension payments to members of Petitioner Union provided for in the collective bargaining agreement were coterminous with that agreement.

2. Whether the Court of Appeals properly affirmed the dismissal of Petitioner Union's claim for suspension pay based on the unique circumstances of this case including the finding that defendant was prejudiced by the Union's failure to assert the claim until after the close of the second trial.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD NOT ISSUE	4
The Decision of the Second Circuit Is Not in Conflict With the Decisions of this Court or Other Courts of Appeals	4
A. The Pension Payments Claim	4
B. The Suspension Pay Claim	6
CONCLUSION	8
SUPPLEMENTAL APPENDIX	SA1

TABLE OF CITATIONS

Cases:	Page
Baake v. General American Transportation, 351 F. Supp. 962 (N. D. Ill., 1972)	6
Bakery & Confectionary Workers v. Great A. & P. Tea Co., 357 F. Supp. 1322 (W. D. Pa. 1973)	5
Boase v. Lee Rubber & Tire Corporation, 437 F. 2d 527 (3rd Cir. 1970)	6
Browning Debenture Holders Committee v. DASA Corp., 560 F. 2d 1078 (2nd Cir. 1977)	6
Crane Co. v. American Standard, Inc., 88 F. R. D. 199 (S. D. N. Y. 1980)	7
Fraser v. Magic Chef-Food Giant Markets, Inc., 324 F. 2d 853 (6th Cir. 1963)	5
Federal Rules:	
Federal Rules of Civil Procedure 15(b)	6

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, Triangle Publications, Inc., opposes the Petition for Writ of Certiorari filed herein on the grounds set forth hereinafter.

STATEMENT OF THE CASE

Petitioner Union commenced this action almost two years after the April 1972 strike of its members caused the shutdown of the Morning Telegraph, a horse-racing newspaper in New York City owned by Respondent which had been in business since 1833. The Complaint sought damages and injunctive relief based upon the alleged relocation of the Morning Telegraph composing room to Hightstown, New Jersey. Both the strike, which lasted one and a half years, and the lawsuit were based on Petitioner's contention that it was entitled to represent employees at a plant in Hightstown, New Jersey publishing another horse-racing newspaper, the Daily Racing Form, also owned by Respondent,[1] even though any such recognition of Petitioner Union would have been barred by Respondent's collective bargaining contract with another union local representing the Hightstown employees.

Following the filing of a counterclaim by Petitioner, the Union commenced a course of delay and violation of

1. In 1972, Respondent operated nine plants throughout the United States and Canada which printed the Daily Racing Form, a newspaper different in form, content and circulation from the Morning Telegraph.

court orders and rules which was the subject of various opinions and orders in the trial court and which delayed this litigation for many years. (SA1) On August 11, 1976, on Triangle's Motion for Summary Judgment, the trial court dismissed the Union's claim that it—rather than another International Typographical Union which had a collective bargaining agreement with Triangle—was entitled to represent the employees at the Daily Racing Form in Hightstown.

The case was called for trial on the remaining claims on January 19, 1977, but dismissed by Order dated January 31, 1977 pursuant to Rule 41(b) of the Federal Rules of Civil Procedure "for plaintiff's woeful failure to be ready to proceed to trial." Upon the Union's motion, the Court conditionally reinstated the case on March 9, 1977 and eventually permitted the case to proceed again to trial, even though the Union failed to comply with the conditions of the reinstatement. See Order of March 9, 1977 attached hereto as SA1.

The case was again called for trial which was held during eight days in January and February, 1978. The trial court rendered its findings of fact and conclusions of law on September 14, 1978. Although finding no relocation had occurred, the District Court initially found that Respondent had suspended the Morning Telegraph and was liable for suspension pay to Petitioner's members. The District Court denied Petitioner's claim for supplemental pension benefits.

After subsequent motions for reargument filed by Petitioner and Respondent, the District Court, *inter alia,* awarded Petitioner $149,387.02 for sick pay and holiday pay which had accrued prior to the strike, but denied any recovery for suspension pay based on the circumstances of record, finding that Petitioner had never asserted such a

claim prior to or during trial, and that defendant would be substantially prejudiced by the post-trial amendment of the complaint. On appeal, the Court of Appeals for the Second Circuit affirmed the decisions of the District Court on December 18, 1980. Petitioner's Petition for Rehearing was denied on February 10, 1981.

REASONS WHY THE WRIT SHOULD NOT ISSUE

The Decision of the Second Circuit Is Not in Conflict With Decisions of This Court or Other Courts of Appeals

Petitioner has presented no special or important reason why this Court should decide any question presented by the decisions below. The rulings of which it complains were grounded on the unique and unusual circumstances and facts of this case, and do not contravene or even implicate any important area of federal policy. Furthermore, Petitioner has not shown that the Court of Appeals' decision conflicts with decisions of this Court or other Courts of Appeal.

A. The Pension Payments Claim

Supplemental pension payments were denied based upon a reasonable interpretation of the collective bargaining agreement between the parties. The collective bargaining agreement contained two pension clauses. The Union members' principal pension, to which Respondent contributed 5% of the members' gross compensation, was the International Typographical Union Negotiated Pension Plan. Respondent complied with that Plan, and that pension is not at issue. At issue here are supplemental pension payments, not tied to the principal pension, which were provided for in a Supplemental Agreement to the collective bargaining agreement as an additional economic condition to the Union's contract with the Morning Telegraph. These supplemental pension payments were linked to and dependent upon the existence of the collective bargaining agreement, did not vest, could not exceed $50.00 per month and were not part of a funded pension plan.[2]

2. At trial, Petitioner failed to prove that there were any general funds with which to make the supplemental pension payments.

The Court of Appeals affirmed the District Court's findings as to these supplemental pension payments, which were as follows:

> "However, the provision of this plan states '[t]he Pension Plan will not be terminated or modified during the life of the collective bargaining agreement without mutual consent.' (Supplemental Agreement at p. 10). The language of this provision implicitly suggests that the plan may be terminated upon the expiration of the Supplemental Agreement. As determined in the earlier Opinion of this Court, the agreement terminated when the defendant suspended the operations of the Morning Telegraph. Moreover, the agreement provides that the Pension Plan would not be funded. Payments of benefits were to be made from the general funds of the Morning Telegraph. When the Morning Telegraph ceased to exist, no further payments could be made from its general funds. The Plan must, therefore, have been intended to terminate when the Morning Telegraph ceased its operations. Consequently, the defendant is not liable for pension payments which plaintiff claims to have accrued after the date of suspension of operations."

Contrary to Petitioner's claim that rights to the supplemental pension payments had "vested", there is no vesting provision in the supplemental pension clause. Furthermore, it is well established that the rights of union members to benefits under a collective bargaining agreement cease upon the discontinuance of a business. *Fraser v. Magic Chef-Food Giant Markets, Inc.*, 324 F. 2d 853 (6th Cir. 1963); *Bakery & Confectionary Workers v. Great A. & P. Tea Co.*, 357 F. Supp. 1322 (W. D. Pa. 1973). Where a pension is subject to certain conditions, the happening of those conditions can effectively terminate the

pension. *Boase v. Lee Rubber & Tire Corporation*, 437 F. 2d 527 (3rd Cir. 1970). In the present case, the Supplemental Agreement terminated upon the discontinuance of the Morning Telegraph, and the obligation to make the supplemental pension payments terminated also, as the courts below held. See *Baake v. General American Transportation*, 351 F. Supp. 962 (N. D. Ill., 1972).

B. The Suspension Pay Claim

Likewise, the courts below relied upon the circumstances of record in this case in concluding that Petitioner could not recover for suspension pay. The Amended Complaint asserted no liability or claim for suspension pay. (A. 36). In its Order of December 20, 1979, the District Court specifically found that prior to and during the second trial, Petitioner had never asserted a claim for suspension pay. (A. 28) Indeed, as a condition to reinstatement of Petitioner's Amended Complaint, which had been dismissed after the first trial, the District Court specifically directed Petitioner to list its contentions. (SA3) In its Proposed Pretrial Order which followed, Petitioner made no claim for suspension pay. (A. 28) Only in its belatedly submitted post-trial papers did Petitioner for the first time contend it was entitled to suspension pay. (A. 26)

At no time did the Union move to conform the pleadings to the evidence or to amend its complaint to assert a cause of action for suspension pay. Therefore, the Union's entitlement to maintain a claim for suspension pay depends on whether the claim was "tried by express or implied consent" of Triangle. F. R. C. P. 15(b). As stated by the Second Circuit in *Browning Debenture Holders' Committee v. Dasa Corp.*, 560 F. 2d 1078, 1086 (2nd Cir. 1977):

> "The purpose of Rule 15(b) is to allow the pleadings to conform to issues already tried, not to extend the pleadings to introduce issues inferentially suggested by incidental evidence in the Records."

In accord: *Crane Co. v. American Standard, Inc.*, 88 F. R. D. 199, 205 (S. D. N. Y. 1980).

On this issue of trial by consent, the District Court made the specific finding that "a review of the trial transcript indicates that this claim was not actually litigated and that, in any case, defendant did not expressly or impliedly consent to trial of the claim." The District Court further found that evidence touching on suspension was introduced only in connection with the claim for relocation severance payments, that there was undue delay in asserting the claim for suspension, and that Triangle would be substantially prejudiced by an amendment of the complaint after the conclusion of the trial. (A. 29) Based on the Court's findings and the record in this case, it cannot be said that the courts below abused their discretion in disallowing Petitioner's claim for suspension pay.

Contrary to the vehement assertions of Petitioner, Respondent never acknowledged liability for suspension pay. While the fact of suspension was admitted for the purposes of trial since there was no claim for suspension pay, the voluntariness or liability for suspension pay was not. The proof of this point is that had suspension pay been claimed and liability therefor admitted by Respondent, it would have been pointless to hold an eight-day trial to litigate the issue of whether a relocation occurred.[3]

The cases relied upon by Petitioner are all distinguishable from the facts in this case. In none of the cases cited by Petitioner was prejudice found to the defendant, whereas here the District Court specifically found preju-

3. In its post-trial motions, Petitioner claimed that suspension pay was equal to relocation severance pay.

dice to Respondent. (A. 29) Indeed, had Petitioner raised the issue of suspension pay, Respondent could have raised the existence of an arbitration clause as a bar to litigation[4] as well as other affirmative defenses, declined to stipulate to certain matters and tried the case differently. In addition, Respondent was prejudiced by being unable to submit testimony on the suspension pay issue from the Morning Telegraph's publisher whose deposition Respondent took prior to his death and before the trial of this case.

CONCLUSION

The Petition herein raises no special or important issue for decision by this Court. The decisions of the two lower courts were grounded on contract interpretation and the unique facts of this case. These decisions do not contravene any decisions of this Court or other Courts of Appeal, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: June 5, 1981

4. When Respondent raised the existence of the arbitration clause as a potential bar to the suspension pay claim in its post-trial motion, Petitioner replied as follows:

> "The defendant never pleaded the affirmative defense of arbitration in its answer to plaintiff's complaint, which answer contained counterclaims against the plaintiff herein. This defense was, therefore, conclusively waived." Plaintiff's Memo in Opposition to Reargument, p. 2, 8/21/79.

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2674

NEW YORK TYPOGRAPHICAL UNION, NO. 6,
Plaintiff,

v.

TRIANGLE PUBLICATIONS, INC.,
Defendant.

Order

On January 19, 1977, when this matter was called for trial, counsel for the plaintiff failed to submit its pre-trial memorandum of law and its proposed findings of fact and conclusions of law, contrary to orders and directives of this Court which had been outstanding since August 11, 1976. Upon motion of defendant's counsel, this Court dismissed plaintiff's complaint for failure to prosecute pursuant to Rule 41(b) Fed. R. Civ. P. Defendant at that time consented to a discontinuance of its counter-claim. The dismissals were made without prejudice.

As the record in this case reflects, the above was not plaintiff's first default in this action. Plaintiff failed to file a reply to defendant's counter-claims until more than *one year* after those counter-claims were served and filed. Plaintiff failed to respond to defendant's eight interroga-

tories and defendant's requests for admission until three months after service. Indeed, plaintiff did not, until the day of trial, provide the defendant with certain discovery which had long been due.

Both parties now move against this Court's January 19, 1977 order dismissing the action. Plaintiff moves, pursuant to Rule 60(b) Fed. R. Civ. P. for an order vacating the dismissal and reinstating the complaint. Defendant moves for an order pursuant to Rule 41(b) Fed. R. Civ. P. dismissing the complaint with prejudice.

The law in this Circuit is that a significant and unexplained delay by the plaintiff in the service of pleadings or other vital court papers can result in a dismissal for failure to prosecute, regardless of whether there has been any prejudice to the defendant. See *Joseph Muller Corp. v. Societe Anonyme de Gerance et D'Armement*, 508 F. 2d 814 (2d Cir. 1974) (*per curiam*); *Messenger v. United States*, 231 F. 2d 328 (2d Cir. 1956). It is further the established rule in this Circuit that dismissals for failure to prosecute are largely a matter for the trial court's discretion. See *Joseph Muller Corp., supra.*

In this case plaintiff's action has moved forward only through the motion practice of the defendant or through the prodding of this Court. In the three years during which this action has been pending, plaintiff has shown no significant interest in moving the case forward or proceeding to trial. In three years, the only applications plaintiff has ever made to this Court have been for extensions of time in which to respond to defendant's pleadings or motion practice. Plaintiff had originally pleaded class action allegations in its complaint; yet plaintiff never moved for an order certifying this as a class action. The issue of class action status was not resolved until defendant made a successful motion to strike those allegations. See *Powers v. Triangle Publications*, 74 Civ. 2674 (S. D. N. Y. Dec. 31, 1974).

In considering plaintiff's motion to reopen the case, it is appropriate and indeed necessary for this Court to examine the entire procedural history of the litigation. See *Securities and Exchange Commission v. Power Resources Corp.*, 495 F. 2d 297 (10th Cir. 1974); *Sheaffer v. Warehouse Employees Union*, 408 F. 2d 204 (D. C. Cir.), *cert. denied*, 395 U. S. 934 (1969). It is clear that defendants have carried the burden of moving this action; it is equally clear that plaintiff has totally failed to carry its burden. See *S&K Airport Drive-Ins, Inc. v. Paramount Film Distributing Corp.*, 58 F. R. D. 4 (E. D. Pa. 1973).

In its moving papers, plaintiff's counsel assert that they were under a good faith belief that this Court had granted to them until the second or third day of trial in which to file their pre-trial papers. This allegation is said to be founded on a telephone conversation between one of plaintiff's counsel and one of this Court's clerks. While it is clear that no such permission was in fact granted by the Court, plaintiff's papers do indicate that the failure to file pre-trial papers was due to a misunderstanding, inadvertence, or perhaps even a good faith mistake by counsel. If such is the case, dismissal in unwarranted and the Rule 60(b) motion should be granted. See *Pond v. Braniff Airways, Inc.*, 453 F. 2d 347 (5th Cir. 1972). Of course, there is not even any claim by the plaintiff that it had permission to delay the filing of pre-trial papers from August 1976 until January 1977, when the claimed conversation with the clerk was held.

Accordingly, it remains this Court's view that the prior order dismissing the complaint was not an abuse of discretion. However, upon reconsideration, and since there is no evidence that the failure of counsel was caused by any actions of the plaintiff itself, the Court determines that, in the interests of justice, plaintiff should be given an opportunity to reinstate the complaint by demonstrat-

ing its willingness to move this action forward and to comply with the Court's directives.

Accordingly, plaintiff's motion to vacate the order of dismissal heretofore entered is denied unless within ten days hereof plaintiff serves upon the defendant a proposed form of pre-trial order, setting forth all facts not in dispute, all facts which are in dispute, plaintiff's contentions, a list of plaintiff's trial witnesses, and a list of plaintiff's trial exhibits. Defendant shall respond with its contentions promptly thereafter. As a further condition to the reinstatement of the complaint, plaintiff must file with the Court within twenty days hereof a pre-trial memorandum of fact and law addressing the issues raised by the decision on the summary judgment motion, and also must file proposed findings of fact and conclusions of law. The Court will not accept from the plaintiff any restating of its position on the summary judgment motion; the pre-trial memorandum must address the action as it now stands.

In the event plaintiff complies with each and every condition of this order, the complaint and the counterclaims will be reinstated. If plaintiff fails to comply with any of the foregoing, the judgment of dismissal heretofore entered shall stand and each of the parties present motions shall be denied.

SO ORDERED.

Dated: New York, New York
March 9, 1977

/s/ LAWRENCE W. PIERCE
Lawrence W. Pierce
U. S. D. J.